INDEX

Subject Index

	PAGE
SUMMARY STATEMENT OF CASE	1
Proceedings before the Commission	1
The *Lisbon case*	1
The *First Ex-River case*	2
The *Second Ex-River case*	2, 3
Rate reductions forced by rates suggested by the Commission	3
Petitions for reconsideration	4
The *Third Ex-River case*	5
Findings	5-7
Order	7
Events following decision by Commission	8
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. The bill of complaint should be dismissed because the case is moot. Only abstract or hypothetical questions, the determination of which is not essential to the preservation of the rights of the parties, are raised by appellants	13
The relief sought	14
No railroad has assailed the Commission's order and the rates are now effective	14
II. The Appellants have no standing which entitles them to attack the Commission's order and the Court is without jurisdiction to accord relief	16
Appellants merely lost an advantage which the Commission found to be unlawful	17
Appellants have remedy by statute	19

PAGE

III. Analysis of Appellants' Statement of the Case, directing attention to numerous errors of fact upon which Appellants' main argument rests . 21

Appellants misstate the interests of intervening railroads 21

The *Lisbon's* costs are not in the record .. 22

The rate of 77 cents was not prescribed but only suggested in the *First Ex-River case* 23

Grounds for petitions by railroads for reconsideration of the *First* and *Second cases* 25

Basis for rates suggested by carriers in the *Third Ex-River case* 25

Order in *Third Ex-River case* similar to that in *Ohio case* 27

Important particulars in which the record in the *Third Ex-River case* differed from that in the *First Ex-River case* 28-31

IV. In making its order the Commission proceeded in accordance with standards under which the lawfulness of rates is determined and that order reflects a proper and lawful exercise of the powers and duties of the Commission and was entirely within its authority 31

1. The rate of 77 cents and other *Ex-River* rates were twice condemned by the Commission as "too low." 31

Connection between ex-river case and rate structure involved in the *Ohio case* .. 31, 32

2. The Commission porperly exercised it powers when it considered all of the factors and standards shown of record in prescribing the minimum rate here in question 32

3. The decision of the Court in the *Milwaukee case* abundantly sustains the Commission's order in the *Third Ex-River case* 35

PAGE

Third Ex-River case distinguished from *Milwaukee case* 35

Third Ex-River case order fixed minimum rate under section 1 which was necessary also to remove discrimination 36

Third Ex-River case order fixed minimum rate under section 1 that was necessary to correct consequences of keen rivalry between railroads 37

4. The Commission was empowered to decide the *Third Ex-River case* on the record then presented unembarrassed by its findings in other cases 39

Costs were not in the record 39, 40

5. The exercise of the Commision's minimum rate power was not actuated by a desire to force river-rail traffic to all-rail routes 40

Ex-water traffic is not nessarily entitled to rates lower than on local or all-rail traffic 41

Appellants' own admissions of their rate advantages under ex-river rates 41

V. The rate comparisons and other evidence of record afford ample support for the finding that the rate of 77 cents tended to cause a disruption of the rate structure and that the rate of 77 cents is unreasonably low 42

Evidence considered by the Commission .. 43

Findings by the Commission 44

Findings are definite 45

Controlling principles of law 46

VI. The Commission properly exercised its powers and duties under the Interstate Commerce Act when it prescribed rate relationships to

PAGE

eliminate undue prejudice and undue preference found to exist, which rate relationships were to be used in connection with minimum reasonable rates prescribed by the Commission 49

1. The Section 3 Order of the Commission was alternative within the requirements and contemplation of the Law..... 49

Undue preference and prejudice must be removed within range of reasonable rates..... 50

2. The Commission's order requires the removal of undue preference and prejudice between particular descriptions of the same traffic..... 53

3. The evidence of record and the findings thereon sustain the Commission's conclusion that undue preference and undue prejudice existed..... 53

Controlling principles of law..... 53

Evidence showing undue preference and prejudice 55

Evidence supported findings..... 56

Illustrations of unsoundness of Appellants' argument..... 56, 58

Findings and conclusion in *Third Ex-River case* are consistent with controlling principles and decisions of the Commission..... 58

CONCLUSION 59

APPENDIX 61

CASES CITED

PAGE

Acme Mills vs. *A. G. S. R. R. Co.*, 136 I. C. C. 114..... 58
Adriatic Mining Co. vs. *C. & N. W. Ry. Co.*, 78 I. C. C. 611..... 22, 40
American Express Co. vs. *Caldwell*, 244 U. S. 617..... 45
Atchison, T. & S. F. Ry. Co. vs. *Interstate Commerce Commission* 190 Fed. 591, 231 U. S. 736..... 42
Atchison, T. & S. F. Ry. Co. vs. *United States*, 284 U. S. 248.... 31
Barrett vs. *A., T. & S. F. Ry. Co.*, 172 I. C. C. 319..... 58
Board of Railroad Commissioners vs. *Great Northern Ry. Co.*, 281 U. S. 412..... 15, 19
California Growers' & S. P. L. vs. *Sou. Pac. Co.*, 185 I. C. C. 299.. 23
Central Railroad Co. vs. *United States*, 257 U. S. 247..... 53
Chamber of Commerce vs. *N. Y. C. & H. R. R. Co.*, 24 I. C. C. 55 48
Chicago, R. I. & P. Ry. Co. vs. *United States*, 274 U. S. 29..... 47
Coal, Bituminous, Ex-River, from Colona and Conway, Pa., to Youngstown (First Ex River case), 163 I. C. C. 3..... 2
197 I. C. C. 617 (*Third Ex-River case*)..... 5
Construction of Branches by Pittsburgh, Lisbon & Western R. R., 150 I. C. C. 43, 150 I. C. C. 619..... 2
Edward Hines Trustee vs. *United States*, 263 U. S. 143..... 20
Ex-River Coal to Cleveland, Lorain and Other Ohio Points (Second Ex-River case), 185 I. C. C. 211; May 31, 1932..... 3
Fluorspar Ex-River Ohio and Pennsylvania, 186 I. C. C. 670..... 41
Florida vs. *United States*, 282 U. S. 194..... 45
Georgia Public Service Commission vs. *United States*, 283 U. S. 765, 45, 47, 48
Green Bay Association of Commerce vs. *A., T. & S. F. Ry. Co.*, 164 I. C. C. 533..... 59
Hines Trustee, Edward, vs. *United States*, 263 U. S. 143..... 20
Illinois Central R. R. Co. vs. *United States*, 206 U. S. 441..... 46
Inland Waterways Corp. vs. *A. G. S. Ry. Co.*, 151 I. C. C. 126.... 59
Interstate Commerce Commission vs. *Chicago G. W. Ry. Co.*, 209 U. S. 108..... 13
Interstate Commerce Commission vs. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479..... 33
Interstate Commerce Commission vs. *L. & N. R. R. Co.*, 227 U. S. 88..... 13, 15, 40
Interstate Commerce Commission vs. *Union Pacific*, 222 U. S. 541.. 46
Interstate Commerce Commission vs. *United States*, 289 U. S. 385.. 15
Jefferson Island Salt Mining Co. vs. *United States*, 6 F.(2d) 315.. 33
Liberty Warehouse Co. vs. *Grannis*, 273 U. S. 70..... 14
Manufacturers Railway Co. vs. *United States*, 246 U. S. 457..... 39, 54
Mississippi Valley Barge Line Co. vs. *United States*, 292 U. S. 282 ..... 15, 46

PAGE

Moffat Tunnel League vs. *United States*, 289 U. S. 113..... 21
New England Divisions Case, 261 U. S. 184..... 47
Northern Pacific Ry. Co. vs. *North Dakota*, 216 U. S. 579..... 22
Northern Pacific Ry. Co. vs. *North Dakota*, 236 U. S. 585.... 22, 33, 40
Ohio Case, 192 I. C. C. 413..... 4, 38, 45, 47
Ohio vs. *United States* (6 Fed. Supp. 380)..... 35
Ohio vs. *United States*, 292 U. S. 498..... 4, 45, 48, 57
Pittsburgh & West Virginia Ry. Co. vs. *United States*, 281 U. S. 479 20
Pittsburgh Coal Producers Assn. vs. *Ashland C. & I. Ry. Co.* (Feb. 20, 1934)..... 49
Potomac Electric Power Co. vs. *C. & O. Ry. Co.*, 142 I. C. C. 230.. 58
Puget Sound Power & Light Co. vs. *City of Seattle*, 271 Fed. 958.. 15
Rates for Transportation of Anthracite Coal, 35 I. C. C. 220..... 23
Robinson vs. *B. and O. R. R. Co.*, 222 U. S. 506..... 19
Skinner & Eddy Corp. vs. *United States*, 249 U. S. 557..... 47
Sprunt & Sons vs. *United States*, 281 U. S. 249..... 17, 18, 19, 20, 52
St. Louis, Southwestern Ry. Co. vs. *United States*, 245 U. S. 136.. 51, 52
Texas vs. *Interstate Commerce Commission*, 258 U. S. 158..... 15
Texas & Pacific Ry. vs. *United States*, 289 U. S. 627..... 51, 52
United States vs. *Abilene & So. Ry. Co.*, 265 U. S. 274..... 40
United States vs. *Anchor Coal Co.*, 279 U. S. 812..... 15
United States vs. *Chi., Milwaukee, St. P. & P. R. R. Co.*, No. 379 Oct. Term, 1934..... 13, 27, 35, 36, 37, 38, 39
United States vs. *Ill. Central R. R. Co.*, 263 U. S. 515..... 13, 50
United States vs. *Merchants & Manufacturers Traffic Assn.*, 242 U. S. 187..... 20
Virginian Railway Co. vs. *United States*, 272 U. S. 658..... 15, 47
Western Paper Makers' Chemical Co. vs. *United States*, 271 U. S. 268..... 15, 47
Youngstown Sheet and Tube Co. vs. *P. & L. E. R. R. Co.*, 20 I. C. C. 428..... 22

STATUTES

Interstate Commerce Act.
Section 1 (5)..... 61
Section 3 (1)..... 61
Section 15 (1)..... 62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. 552

THE YOUNGSTOWN SHEET AND TUBE COMPANY ET AL., *Appellants*

vs.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION, *Appellees*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF FOR RAILROAD INTERVENERS

SUMMARY STATEMENT OF CASE

This case is here on direct appeal prayed under provisions of the Act of October 22, 1913, c. 32, 38 Stat. 220; U. S. Code Title 28, Sections 47 and 47a.

The historical background is important. In 1928 the Pittsburgh, Lisbon & Western Railroad sought authority to create a new rail route, by extensive and new construction, to move coal from the Ohio River, at a point in Pennsylvania, to Youngstown, Ohio. The application was denied upon

the finding that sufficient railroad facilities already existed and upon the representation of the existing carriers that they would construct facilities for transferring coal from barge to rail at suitable Ohio River points. *Construction of Branches by Pittsburgh, Lisbon & Western R. R. Co.*, 150 I. C. C., 43; 150 I. C. C., 619 (R. 50-71).

The transfer facilities were constructed by the existing rail lines and tariffs filed providing a rate of $1.02 per net ton from Colona and Conway, Pennsylvania, for the rail movement to Youngstown, Ohio. Upon protest of shippers the schedules were suspended and later ordered canceled without prejudice to the filing of new tariffs carrying a rate of 77 cents per net ton, which in the opinion of Division 5 of the Commission would be a reasonable maximum rate (R. 84). *Coal, Bituminous, Ex-River, from Colona and Conway, Pa., to Youngstown*, 163 I. C. C., 3, decided March 27, 1930 (on a record made during May, 1929, R. 189), and hereinafter called the *First Ex-River Case* (R. 72).

The Interstate Commerce Commission not having ordered the publication of the 77-cent rate, and no demand then existing for the service, the rate was not immediately published. In June, 1931, the Wheeling and Lake Erie Railway Company (hereinafter called the Wheeling), not serving the Pennsylvania coal fields but desiring to carry tonnage from those fields, filed schedules naming rates on ex-river coal from points on its River Division, namely Martins Ferry, Steubenville, Ohio, and other points in that vicinity [all in Ohio No. 8 coal district], to Canton, Massillon, Lorain, South Lorain and Cleveland, Ohio (R. 86). The proposed rates were well below the contemporaneous rates from mines in Ohio No. 8 district. Protests were filed by competing railroads to protect the existing rate structure from Ohio, West Virginia and Pennsylvania origins, and

the tariffs were suspended and later ordered cancelled without prejudice to the filing of new schedules naming rates of $1.02 to Canton and Massillon and $1.27 to Cleveland, Lorain and South Lorain (R. 98). This decision was rendered by Division 4 of the Commission, *Ex-River Coal to Cleveland, Lorain and other Ohio Points,* 185 I. C. C., 211, hereinafter called the *Second ex-River Case,* May 31, 1932 (R. 85).

Subsequently, said rates of $1.02 and $1.27 to the destinations named and the 77-cent rate suggested in the *First Ex-River Case* were all published to become effective simultaneously on July 16, 1932 (R. 25).

At that time there was being maintained, what was later described by the lower court in the *Ohio case* (6 Fed. Sup. 386, 387), and referred to by this Court in the same case on appeal (292 U. S. 502)—

> . . . "a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from western Pennsylvania, northern West Virginia and Ohio coal mining districts to northeastern Ohio, with fixed differentials which have been regarded as essentially reasonable in view of all the elements which must be considered in rate making."

Almost immediately after ex-river rates were established, the first action was taken which resulted in the final hearing by this Court of the *Ohio case* above referred to. On August 1, 1932, the Public Utilities Commission of Ohio required the railroads to reduce certain all-rail rates on coal to destinations in northeastern Ohio, and on that same date the Wheeling was authorized by the same Commission to reduce additional all-rail rates (R. 1569, 1570). This action of the Wheeling was admittedly largely influenced by and based upon the ex-river rates which became effective July 16, 1932 (R. 1471, 1478). The rates thus reduced—

and certain others reduced before November 1, 1932—were removed from their fixed relationships with other all-rail rates, including, in particular, rates for interstate movements. The resulting disparity between the reduced all-rail Ohio intrastate rates (influenced by the interstate ex-river rates), on the one hand, and the prevailing interstate rates, on the other hand, was considered in the proceeding before the Interstate Commerce Commission under the 13th section of the Interstate Commerce Act and resulted in the decision in the *Ohio case*, so called, 192 I. C. C., 413, 415, 416 (R. 1545 &c.), in which the Commission found that undue preference and prejudice existed and that the reduced Ohio intrastate rates unduly discriminated against interstate commerce and directed that this unlawfulness be removed by increasing the intrastate rates to their former level. The order of the Commission in that case was sustained by this Court in *Ohio* vs. *U. S.*, 292 U. S. 498.

The level of the ex-river rates, established for the first time on July 16, 1932, and used as an excuse by the Wheeling for reductions of all-rail rates, was so far below the level of reasonableness as to seriously threaten the all-rail interstate rate adjustment, and this conflict between the level of all-rail interstate rates and the ex-river rates became a vital question during the hearings in the *Ohio case*, but a corrective order could not be entered at that time because the ex-river rates were not then before the Commission (192 I. C. C., 413, 433, 434, R. 1569, 1570). This conflict was recognized, however, by the railroads (intervening railroads in the case now before this Court) and two petitions were filed with the Commission for reconsideration of the *First* and *Second Ex-River cases*. The first petition was denied. The second petition (R. 1570) was pending when the *Ohio case* was decided by the Interstate Commerce Commision on May 2, 1933, and this fact is noted in the Commis-

sion's report (R. 1570). The Commission by its order of May 8, 1933—six days after the decision in the *Ohio case*—reopened the two ex-river cases for reconsideration, and consolidated them for further hearing.

The *First* and *Second Ex-River Cases* both primarily presented questions of relationships. Ex-river rail transportation in the territory involved presented a new and untried service, and the railroads whose routes stood to be supplanted in whole or in part by ex-river routes (except the Wheeling, of course, which stood to gain) were extremely fearful of drastic losses in revenues, not only from traffic lost to the river but from reductions in all-rail rates from inland mines that might be forced competitively if the ex-river rates, available to river mines but not to inland mines, should be upon an improper basis.

The reconsideration by the Commission resulted in the decision in *Coal, Bituminous, Ex-River, From Colona and Conway, Pa., to Youngstown Ohio*, 197 I. C. C., 617 (R. 23, Order, R. 1540), hereinafter called the *Third Ex-River case*, the order in which is here under review. It is to be observed that the decision in this case was by the entire Commission, whereas the decisions in the *First* and *Second cases* were by Divisions 5 and 4, respectfully, of the Commission. The *Third Ex-River case* is closely related to the *Ohio case* and the report and order therein read in conjunction with the *Ohio case*, served to bring into harmony and balance all of the rates applicable to coal in the general territory here under discussion.

In the *Third Ex-River case* the Commission held:

Page 619

> . . . "The sole question is whether the rates approved in the two former reports in this proceeding are less than they should be" (R. 27).

Pages 633, 634

. . . "A peculiar condition exists on ex river coal traffic. This condition, while differing from that shown in the *Lake Cargo Coal Cases*, is equally vital, especially to coal operators located adjacent to the Monongahela, Allegheny, and Ohio Rivers, on the one hand, and those located inland, on the other. This competitive relationship should not be overlooked as the record establishes that the present ex river rates have, in a great measure, deprived the inland mines of their former markets in northeastern Ohio. Our power to correct this situation has been invoked in the present proceeding and should be exercised to the extent of our authority under the law. The record also fully establishes that the maintenance of the present ex river rates has tended to disrupt the rate adjustment in this territory and jeopardized the revenues of the rail carriers. [see R. pp. 1477, 1478]. The view was expressed in the *Ohio case* that the difference between the ex river rates and the all-rail basis of rates was too great. The evidence indicates that the ex river rates are too low and for that reason are unreasonable. The Supreme Court said in *Interstate Commerce Commission* vs. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, at page 511: 'Now the rate may be unreasonable because it is too low as well as because it is too high.' Furthermore, in *Jefferson Island Salt Mining Co.* vs. *U. S.*, 6 Fed.(2d) 315, we were sustained in prescribing minimum rates to preserve reasonable rate relationships.

"*Findings.*—We affirm the former findings in these proceedings that the schedules there proposed are not justified. We, however, modify the additional findings in the former reports and find that the ex river rates assailed are unreasonably low to the extent that they are or may be less than the following: From Colona and Conway to Youngstown

90 cents, and from the Wheeling's River division transfer points to Canton and Massillon $1.20, and to Cleveland, Lorain, and South Lorain $1.45; to apply on ex-river coal originating at mines on the Monongahela, Allegheny, and Ohio Rivers, transferred from river barges or boats to railroad cars, when for truck delivery at the destinations named above; said rates to be subject to a minimum of 50,000 pounds; and that the findings herein are without prejudice to the establishment of an ex-river rate of 90 cents from Colona and Conway to Youngstown, and ex-river rates from the points named herein on the Wheeling's River division of $1.20 to Canton and Massillon and $1.45 to Cleveland, Lorain, and South Lorain, and said rates to be subject to a minimum of 50,000 pounds" (R. 44, 45, 46).

The Commission further found that the then existing ex-river rates caused undue prejudice against operators of mines remote from the rivers in the Pittsburgh and other districts and ordered the removal of that prejudice by the publication of rates that would reflect certain prescribed differences between ex-river rates on the one hand and the all-rail rates on the other hand.

The Commission issued its order (R. 1541, 1542) as follows:

"It is ordered that respondents, . . . cease and desist, . . . from publishing . . . their present ex-river rates . . . which are found in said report to be unreasonably low, unduly prejudicial and unduly preferential.

"It is further ordered that respondents . . . maintain and apply . . . rates which shall not be less than the following: From Colona and Conway, Pa., to Youngstown, Ohio, 90 cents per net ton; and from transfer points in Ohio on the River division of The Wheeling and Lake Erie Railway Company

to Canton and Massillon, Ohio, $1.20 per net ton, and to Cleveland, Lorain, and South Lorain, Ohio, $1.45 per net ton.

"It is further ordered that said respondents . . . maintain and apply . . . ex-river rates from Colona and Conway, Pa., and from transfer points on The Wheeling and Lake Erie Railway Company's River division in Ohio, to the destinations hereinafter indicated, which shall not be less than the following: From Colona and Conway to Youngstown 44 cents under the contemporaneous all-rail rates maintained by respondents on like traffic from the Pittsburgh district to the same destination and 44 cents plus or minus, as the case may be, the present existing differentials over or under the rates from the Pittsburgh district from Freeport, Connellsville, and Fairmont districts to the same destination, and from The Wheeling and Lake Erie Railway Company's River division transfer points to Canton, Massillon, Cleveland, Lorain, and South Lorain, 39 cents under the contemporaneous all-rail rates maintained from the Pittsburgh district to the same destinations, and 39 cents plus or minus, as the case may be, the present existing differentials over or under the rates from the Pittsburgh district from Freeport, Connellsville, and Fairmont districts to the same destinations."

On January 29, 1934, The Youngstown Sheet and Tube Company, Republic Steel Corporation, Sharon Steel Hoop Company, and the Youngstown Chamber of Commerce, invoking the provisions of the Urgent Deficiencies Act, of October 22, 1913, 38 Stat. 208, 219, 220, filed their single bill of complaint in the United States District Court for the Northern District of Ohio, Eastern Division, to set aside and annul said order of the Commission. In this bill the United States and the Interstate Commerce Commission were named as parties defendant. Numerous interested

carriers and shippers were subsequently, on motions of intervention, likewise made parties in support of the defendants.

The case came on for hearing before a three-judge statutory Court upon said bill of complaint, including the report and order, and entire record before the Interstate Commerce Commission, and the answers of defendants and interveners to said bill. At the said hearing the plaintiffs amended their bill of complaint by the addition of an allegation that the rates prescribed by the Commission were unreasonably high. Thereupon, by agreement of the parties, the answers of the defendants and interveners to the original bill were stipulated as answers to the bill as thus amended. With the consent of all parties, at said hearing, on March 10, 1934, the case was submitted as on final hearing for final decree.

On April 13, 1934, the District Court entered its order restraining and suspending the order of the Interstate Commerce Commission until the further order of the Court (R. pp. 126, 127). On May 12, 1934, the District Court handed down its opinion and on June 8, 1934, the temporary injunction or restraining order of April 13, 1934, was vacated and set aside and the bill decreed to be dismissed for want of equity, at the cost of the several plaintiffs (R. pp. 148, 149). Thereafter, to wit, on June 19, 1934, the railroads established rates which are in accordance with the Commission's order of December 5, 1933, as amended, and those rates are still in effect. Probable jurisdiction was noted by this Court on December 17, 1934.

SUMMARY OF ARGUMENT

I

The bill of complaint should be dismissed because the case is moot. Only abstract or hypothetical questions, the determination of which is not essential to the preservation of the rights of the parties, are raised by appellants.

Independently of the Commission's order the rates named therein could have been voluntarily published by the railroads, and those rates are now effective. No railroad has assailed the Commission's order. Appellants have a complete remedy before the Commission.

II

The appellants have no standing which entitles them to attack the Commission's order, and the Court is without jurisdiction to accord relief.

Appellants are entitled only to rates that are reasonable and otherwise lawful. They cannot assail an order of the Commission which diminishes an advantage that they as shippers held under a rate structure theretofore effective but which was found by the Commission to result in undue preference and undue prejudice.

III

Analysis of appellants' statement of the case directing attention to numerous errors of fact upon which appellants' main argument rests.

In the interest of clarity and helpfulness numerous errors in appellants' statement of the case and argument are illustrated. Contrary to appellants' contentions the fact situation in the *Third Ex-River case* was very different from that before the Commission in the *First Ex-River case.*

IV

In making its order the Commission proceeded in accordance with standards under which the lawfulness of rates is determined, and that order reflects a proper and lawful exercise of the powers and duties of the Commission and was entirely within its authority.

1. THE RATE OF 77 CENTS AND OTHER EX-RIVER RATES WERE TWICE CONDEMNED BY THE COMMISSION AS TOO LOW.

2. THE COMMISSION PROPERLY EXERCISED ITS POWERS WHEN IT CONSIDERED ALL OF THE FACTS AND STANDARDS SHOWN OF RECORD IN PRESCRIBING THE MINIMUM RATE HERE IN QUESTION.

3. THE DECISION OF THE COURT IN THE MILWAUKEE CASE ABUNDANTLY SUSTAINS THE COMMISSION'S ORDER IN THE THIRD EX-RIVER CASE.

In the *Milwaukee case* the Commission fixed a minimum reasonable rate solely to preserve a rate structure. In the instant case, a minimum reasonable rate was prescribed to establish fair rate relationships that would remove discrimination and preference and correct inequality which caused rivalry between railroads that menaced efficient service.

4. THE COMMISSION WAS EMPOWERED TO DECIDE THE THIRD EX-RIVER CASE ON THE RECORD THEN PRESENTED, UNEMBARRASSED BY ITS FINDINGS IN OTHER CASES.

5. THE EXERCISE OF THE COMMISSION'S MINIMUM RATE POWER WAS NOT ACTUATED BY A DESIRE TO FORCE RIVER-RAIL TRAFFIC TO ALL-RAIL ROUTES.

V

The rate comparisons and other evidence of record afford ample support for the finding that the rate of 77 cents tended to cause a disruption of the rate structure and that the rate of 77 cents is unreasonably low.

The evidence supported the facts found by the Com-

mission, and the facts found supported the ultimate conclusions of the Commission. The report is clear and definite. The Court will not weigh the evidence or substitute its judgment for that of the Commission.

VI

The Commission properly exercised its powers and duties under the Interstate Commerce Act when it prescribed rate relationships to eliminate undue preference and undue prejudice found to exist, which rate relationships were to be used in connection with minimum reasonable rates prescribed by the Commission.

1. THE SECTION 3 ORDER OF THE COMMISSION WAS ALTERNATIVE WITHIN THE REQUIREMENTS AND CONTEMPLATION OF THE LAW.

2. THE COMMISSION'S ORDER REQUIRES THE REMOVAL OF UNDUE PREFERENCE AND PREJUDICE BETWEEN PARTICULAR DESCRIPTIONS OF TRAFFIC.

3. THE EVIDENCE OF RECORD AND THE FINDINGS THEREON SUSTAIN THE COMMISSION'S CONCLUSION THAT UNDUE PREFERENCE AND UNDUE PREJUDICE EXISTED.

ARGUMENT

I

The bill of complaint should be dismissed because the case is moot. Only abstract or hypothetical questions, the determination of which is not essential to the preservation of the rights of the parties, are raised by appellants.

These two points should be remembered:

1. The ex-river rates effective prior to the Commission's order of December 5, 1933, were not imposed by order of the Commission.
2. Rates within the bounds of the Commission's order of December 5, 1933, were acceptable to the railroads and such a rate-adjustment is now effective.

It is elemental that within the limits of lawfulness the railroads have the primary right to initiate and maintain rates in accordance with their own informed judgment and policies. *Interstate Commerce Commission* vs. *Chicago, G. W. Ry. Co.*, 209 U. S. 108, 118-119; *Interstate Commerce Commission* vs. *Louisville & N. R. R. Co.*, 227 U. S. 88; *United States* vs. *Illinois Central R. R. Co.*, 263 U. S. 515, 522; *United States* vs. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, No. 379, October Term, 1934 decided March 4, 1935. As the ex-river rates effective prior to the Commission's order of December 5, 1933, were not prescribed by the Commission or required by it to be maintained, those rates were necessarily initiated and maintained by the railroads in the exercise of their own prerogative. (It is true, however, that those rates were in accordance with suggestions of the Commission.) This case, therefore, is to be distinguished from those cases in which the court considered orders by the Interstate Commerce Commission—entered under section 13 of the Act—

which imposed intrastate rates in conflict with those prescribed by State commissions. If the court should here enter a decree against the United States, and the Commission, vacating and declaring void the Commission's order, the carriers' rate making prerogative would remain unimpaired. That is to say, the rates now in effect would so continue unless the railroads, in their discretion, voluntarily reduced them.

The bill of complaint prays for a decree against:

> ". . . the United States of America and the Interstate Commerce Commission, and all persons acting for and on their behalf, or on their authority, or the authority of said order, from taking any steps to enforce or carry out said order; . . ." (R. p. 23).

As the railroads were free to publish these ex-river rates of their own volition, independently of the authority of the Commission's order, the relief sought can in no way be fruitful. Moreover, the Commission's order of December 5, 1933, embraces, among others, the ex-river rates of the Wheeling[1] to Cleveland and other Ohio cities. That carrier is not before the court as a defendant or otherwise, and manifestly, it would not be affected by the court's decree. In any event the rates specified in the Commission's order were made those of the carriers' choice, for those rates were accepted, published and are now maintained. The appellants or others may assert their statutory right under the Interstate Commerce Act, and question the reasonableness of these rates by complaint before the Commission. Equity will not issue advisory opinions; determine immature rights, or answer moot questions. *Liberty Warehouse Co.* vs. *Grannis*, 273

[1] Rates prescribed for the Wheeling were projected with reference to the rate of 90 cents prescribed to Youngstown.

U. S., 70, 74. In a *per curiam* opinion, *United States* vs. *Anchor Coal Co.*, 279 U. S., 812, the Court held:

> "These appeals have been fully argued and considered, but in the present situation we find that they present moot issues and that further proceedings upon the merits can neither be had here nor in the court of first instance."

See also *Texas* vs. *Interstate Commerce Commission*, 258 U. S., 158, 162, 164; *Puget Sound Power & Light Co.* vs. *City of Seattle*, 271 Fed., 958, 963.

The Court will not, by mandamus or otherwise, require the Commission to suspend rate schedules, for the Court will not absorb to itself the administrative functions of the Commission or direct how they shall be exercised. *Interstate Commerce Commission* vs. *United States*, 289 U. S., 385, 394; *Board of Railroad Commissioners* vs. *Great Northern Ry. Co.*, 281 U. S., 412; *Mississippi Valley Barge Co.* vs. *United States*, 292 U. S., 282, 286; *Interstate Commerce Commission* vs. *Louisville & N. R. R. Co.*, *supra*; *Western Paper Makers' Chemical Co.* vs. *United States*, 271 U. S., 268, 270, 271; *Virginia Ry. Co.* vs. *United States*, 272 U. S., 658, 663. After the Commission's decision and order of December 5, 1933 were rendered, the appellants could have sought a rehearing. Failing in that effort they could have asked the Commission to suspend the rate tariffs under section 15 (7) or they could have filed a complaint under section 13 and 15 of the Act. The appellants took none of these steps and they should not be heard to call upon equity when they are offered adequate relief by statute.

We have emphasized that the Commission's order merely determined bounds within which the rates were required to be adjusted; that is to say, the order merely prescribed

minimum reasonable rates, and specified fixed relationships between ex river rates from river rail transfer points and all rail rates from mines. Under that order, the carriers were free to publish an ex river rate of 92 cents, to illustrate, from Colona and Conway to Youngstown making a corresponding adjustment in all rail rates this rate being 2 cents higher than the minimum. It is clear, we submit, from our foregoing discussion, that the courts would not have prevented the publication of a voluntary rate of 92 cents. This freedom of action which the carriers retained under the Commission's order demonstrates the want of equity which impresses the appellants' bill of complaint. Certainly the appellants' allegation that the prescribed *minimum* rate is unreasonable does not more readily justify equitable relief than would a like allegation against a carrier's voluntary rate of 92 cents. In either case the remedy is before the Commission. If the rule were otherwise the court would be empowered to protect a shipper against a rate which is *alleged* to be unreasonably high, but would be without power to protect the same shipper from the more burdensome consequences of a higher rate. See appellant's brief, pp. 58, 70, 73-74, 81. In the circumstances here presented it is plain that the bill of complaint is without substance and should be dismissed for want of equity.

II

The Appellants have no standing which entitles them to attack the Commission's order and the Court is without jurisdiction to accord relief.

The appellants, except the Youngstown Chamber of Commerce, received coal at Youngstown. On the ex-river rate of 77 cents their total barge-rail cost was $1.14 (25

cents barge; 12 cents transfer; 77 cents rail) or 28 cents less than the all-rail rate of $1.42 from the Connellsville district—the principal district from which their coal moves—and 20 cents less than the all-rail rate of $1.34 from the Pittsburgh district (R.[3] pp. 78, 1034, 1036, 1042, 1060, 1061). On the increased ex river rate of 90 cents the differences—using appellants' barge charge of 25 cents—in favor of barge-rail shippers and routes, as opposed to all-rail shippers and routes from the Connellsville and Pittsburgh districts, are 15 cents and 7 cents, respectively. The Commission's order, therefore, diminished the rate advantage of shippers of ex river coal and correspondingly worsened the economic situation of purchasers of ex river coal. This partial retraction of an advantage, and its consequent effects, do not entitle the appellants, shippers or receivers of coal, to attack the Commission's order. This is established by the decision of this court in *Sprunt & Sons* vs. *United States*, 281 U. S. 249. There the Court considered, on appeal, a bill of shippers to enjoin an order of the Commission which specified the precise manner in which undue prejudice and undue preference were to be removed. The court held at page 254:

> "*First.* The appellants contend that there is no basis for the Commission's finding of undue prejudice and preference. We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. . . . But that interest [in the proceeding before the Commission] alone did not give them the right to maintain an independent suit, to vacate and set aside

[3] The record shows an instance in which a sales quotation allowed for as little as 8.5 cents for a barge service of 75 miles from West Brownsville, Pa., to Conway, Pa. (R. 996, 997).

> the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled. The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so."

The situation of the appellants here is precisely that of the appellants in the *Sprunt* case. In each case the appellants were shippers who were deprived, in part or in whole, of an advantage under a rate structure which caused undue prejudice and preference. In the instant case the Commission prescribed rate relationships to remove that unlawfulness, subject to certain specified minimum rates. In the *Sprunt* case, however, the Commission prescribed the exact rates that were to be established to remove the undue preference and prejudice. See 123 I. C. C., 685, 695, also *Sprunt* case, *supra*, 254. In directing the exact manner in which the rates were to be increased and reduced in that case the Commission—at least for purposes of that case—specified both minimum and maximum rates; that is to say, in therein determining upon the precise basis or rates which the shippers should be required to pay, the Commission's order

specified minimum rates as effectively as if the rates were designated as such.

The appellants' allegation that the prescribed minimum reasonable rates are unreasonable does not distinguish the present case from the *Sprunt case*, and the District Court should have so held. Rates may be unlawful because they cause undue prejudice and undue preference in violation of Section 3 (1) or because they are unreasonable in violation of Section 1 (5) of the Interstate Commerce Act. *These sections merely prohibit different types of unlawfulness.* The province of the Commission is not more exclusive under the one section than under the other; nor is the Court's power greater under the one section than under the other. The distinction between discrimination in and unreasonableness of rates, as affecting the powers of the Commission or the Court, is in fact "not material." *Board of Railroad Commissioners* vs. *Great Northern Ry. Co., supra*, 423; *Robinson* vs. *B. & O. R. R. Co.*, 222 U. S. 506, 511.

In the *Sprunt case*, page 259, this Court recognized that if the appellants were "aggrieved by the level of the new rates" they have their remedy before the Commission. See also page 255. At page 258 the Court held:

> "If the carriers had, of their own accord, adopted the plan later prescribed by the Commission, appellants could, obviously, not be *heard to complain of the reasonableness* of the rate adopted, except in a proceeding before the Commission instituted under secs. 13 and 15 of the Act." (Italics supplied.)

Likewise the appellants here are free to proceed before the Commission. The remedy before that tribunal it as complete in respect of rates attacked as unreasonable in

violation of Section 1 as it was in the *Sprunt case* in respect of rates alleged to be unduly preferential and prejudicial in violation of Section 3. Manifestly the partial retraction of a competitive advantage under an order which increases an unreasonably low rate does not give rise to equitable relief which this Court cannot accord in instances of a complete retraction of a competitive advantage under an order which changes prejudicial and preferential rates. In either case, as previously stated, the complaining shippers' remedy lies in a proceeding before the Commission under sections 13 and 15 of the Act. In the *Sprunt case* the Court held at pages 256 and 257:

> "Appellants' present position resembles in all essentials one which was put forward in *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 147, 148 and *United States* v. *Merchants & Manufacturers Association*, 242 U. S. 178, 188. There, as here, the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs there, as here, were not subjected to or threatened with any legal wrong. And, since the carriers acquiesced in the order of the Commission, the plaintiffs could not maintain an independent action to annul the order. Appellants' present position is unlike that of the plaintiffs in the cases relied upon. *United States* v. *Village of Hubbard*, 266 U. S. 474; *The Chicago Junction Case*, 264 U. S. 258; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42. In each of those cases, an independent legal right of the plaintiff was affected by the order which it was sought to set aside."

See also *Edward Hines Trustees* vs. *United States*, 263 U. S. 143; *United States* vs. *Merchants & Manufacturers Traffic Association*, 242 U. S. 187; *Pittsburgh & West*

Virginia Ry. Co. vs. *United States*, 281 U. S. 479; *Moffatt Tunnel League* vs. *United States*, 289 U. S. 113.

III

Analysis of Appellants' Statement of the case, directing attention to numerous errors of fact upon which Appellants' main argument rests.

The appellants' argument on brief is based on their statement of the case which, in turn, is misleading and inaccurate in many important particulars. Their argument is largely answered if it is examined in the light of the fact situation and for that reason, and with the view of assisting the court, we here point out errors of fact in appellants' summary of the case and particulars in which that summary is in need of an explanation. We believe this can be done more briefly and more helpfully in this separate section than by discussions in the remaining sections of our brief in which the merits and principles of law are considered.

The appellants represent[2*] that only the Pennsylvania and Pittsburgh & Lake Erie are major carriers of coal to Youngstown. The Baltimore & Ohio is one of the three principal coal carriers to Youngstown (R. 58), and participates in the ex-river rate from[2**] Colona to Youngstown. Some of the most important producing mines, including the Nemacolin Mine of the appellant Youngstown Sheet & Tube Co's, subsidiary, are on the Monongahela Railroad (R. 1934, 1035, 1292 B and map exhibits). That intervening carrier handles traffic to Youngstown jointly with the lines above mentioned. Other intervening railroads have a substantial interest in the carriage of coal to Youngstown.

[2*] At pp. 4 and 5 of the brief.

[2**] Rate applies via P. & L. E. R. R., New Castle Junct., Pa., B. & O. R. R.—(P. & L. E. tariff I. C. C., 3059, 3103, and 3134.).

The interest of the railroads is not as appellants would have it appear.

Appellants* refer to the Lisbon's proposed rate of 60 cents. This proposal was later abandoned and instead 75 cents was suggested (R. 69). The Lisbon is a coal company owned railroad which by extending its line sought to bring within its control the rates for the rail transportation of coal (R. 55). The *Lisbon case* was not an investigation of rates; nor could the Commission therein make a finding in reference to them (R. 68). The* Lisbon's estimates of costs, which are emphasized by appellants, were premised upon factors of utmost uncertainty; in other words, upon the cost of railroad construction, on which the expert witnesses differed by $3,500,000 (R. 54 58); on the amount of traffic that would be carried by the railroad after it was constructed (compare ex river tonnage from Conway and Coloma with that which the Lisbon expected to carry R. 1430 1432, 54); and ultimately upon a determination of properly chargeable operating costs. Even when the first two of these three elements are certain, it is impossible to determine transportation costs with a fair degree of accuracy. *Adriatic Mining Co. vs. C. of N. W. Ry. Co.*, 78 I. C. C. 611, 632. See *Youngstown Sheet and Tube Co. vs. P. of L. E. R. R. Co.*, 29 I. C. C. 428, 434 435, which involved rates on coal from the Pittsburgh district to Youngstown. *Northern Pacific Ry. Co. vs. North Dakota*, 216 U. S. 579, 581. If costs are fairly approximated the Commission in the flexible limit of its judgment is not bound to make rates with reference to them. *Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S. 585, 598, 599 (*infra*, pp. 33, 34). The Commission has

* 81 pp. 8 to 11, inclusive.

* These estimates of costs, although commented upon by certain witnesses (R. 286 296), were not in the Record before the Commission in any of the ex river cases.

repeatedly approved rates from two to substantially three times the amounts of estimated costs. *California Growers' & S. P. A.* vs. *Sou. Pac. Co.*, 185 I. C. C., 299; *Rates for Transportation of Anthracite Coal*, 35 I. C. C., 220.

The appellants erred in[8] stating that in the *First Ex-River case* the Commission fixed . . . "77c . . . as a reasonable maximum rate." No rate whatever was therein fixed. The Commission merely expressed *the opinion* that on the record before it 77 cents would be a maximum reasonable rate (R. 84). The order directed only that the schedule under investigation be canceled, and discontinued the proceeding (R. 84, 85). We will later point out many important particulars in which the fact situation before the Commission in the *Third Ex-River case* very materially differed from that in the *First Ex-River case*.

The Wheeling's so-called[8] costs were *assumed costs*; that is to say, they were based upon the assumption that tonnage, not then moving, would be added to trains then operated by the Wheeling. Moreover—contrary to appellants' statement—the Wheeling's cost study was challenged, and many errors which characterized it were pointed out by protesting carriers' witness Saur (R. 792-824).

In[8] saying that the decision in the *Second Ex-River case* rested upon the disruption of a rate structure without more, the appellants overlook the finding (185 I. C. C. 211, 220, R. 96) that the proposed rates would lead to a disruption of the all-rail rate structure or would—

> ". . . have marked effects upon the distribution and marketing of coal as between the river mines and the inland mines which latter must continue to pay the all-rail rates."

[8] At page 20. [8] At page 23, including note 33. [8] At pp. 24, 25, etc.

That finding, read with other findings in the report, states in substance and effect that the proposed ex-river rates if permitted to be established would cause undue prejudice and preference (see rate comparisons, 185 I. C. C., 211, 215, 216, R. 90-92). This finding is sustained by evidence in behalf of protesting coal companies (see Commission's report, 185 I. C. C., 211, 215, 216, R. 90-92, and evidence of Witnesses Duffy, Jamison, Donahoe and Seyms, R. 655-665, 756-765, 772-788). This case stands in contrast with the *Milwaukee case* in which the Commission's condemnation of rates then proposed was based solely on the effect which those rates would likely have on the general rate structure, not connected in any way with evidence even tending to show undue prejudice and preference. See the Commission's reports in the *Milwaukee case*, 197 I. C. C., 245; 200 I. C. C., 609, 619, 621, 622.

Contrary to appellants'[*] contention the rate approved in the *First Ex River case* did, in fact, give rail traffic to some railroads to the exclusion of others—of course not to the same extent as the rates approved for the Wheeling. For example, traffic moved directly via the Pennsylvania or Pittsburgh & Lake Erie on the 77 cents rate was made up, in part, of traffic which otherwise would have moved via Monongahela R. R., or other of the intervening railroads.

The ex-river cases were reopened May 8, 1933 (R. 1514, 1540) rather than May 2, 1933, as stated by appellants. The grounds for the petition for reconsideration are not pertinent here, for it is not contended that the Commission abused its discretion in reopening the case. Moreover, the cases were reopened in their entirety and rehearing was granted (R. 1514). The issue on reconsideration was "whether the rates approved in the two former reports

[*] At page 28.

[*] At page 28.

. . . are less than they should be" (R. 27). Investigation and suspension proceedings as the *Ex-River cases* were—involve every form of lawfulness within the scope of the Interstate Commerce Act.

Appellants say in their brief at pages 28 and 29:

> "Both petitions for rehearing were based solely upon the allegation that the 77c rate was too low because it threatened the general rate structure and the revenues of the trunk lines. Nowhere in the petitions is there an allegation that the 77c rate was unreasonably low for any other reason or in any other respect. No attack was made, from the standpoint of cost or value of service, or earnings, upon the finding made by the Commission in the *First Ex-River Case* that the 77c ex-river rate to Youngstown was a reasonable maximum rate."

Substantially the same statement frequently appears in appellants' argument. The appellants, however, entirely overlooked paragraphs IX, X and XVI of the petition for reconsideration. See, in particular, paragraph XVI in which it was alleged that the ex-river rates (including 77c) "as they apply currently, *are entirely too low, when measured by every proper standard*, and for that reason, etc." (R. 1191, 1192, 1197).

Appellants[*] say:

> "With a single exception, no new rate comparisons were offered."

This statement is untrue. The appellants ignore the major or basic comparisons upon which the ex-river rates proposed by the railroads in the *Third Ex-River case* were premised (R. 980). (Also see rates in Exhibits F 7 and F 8, R. 1393-1401; and testimony, 971, 972.) Many additional rate comparisons, not in the original record, which appel-

[*] At page 29.

lants overlooked are shown in Exhibits F 9, F 10 and F 25, R. 1402, 1403, 1422 and 1523. See note below.

Appellants seriously * misstate the nature and effect of the petition for rehearing and the evidence of petitioning carriers on rehearing. Wholly aside from questions of relationship and of disruption of a rate structure the ** carriers contended that 77 cents was entirely too low and that a rate as high as $1.01 was within the range of reasonableness. (R. 958-60, 980, 989). See ** conclusion of the

Note: The Commission found:

> "All of these [certain compared] rates are as high as or higher, distance considered, than the suggested rate of $1.01 from Coloma and Conway to Youngstown. Other all-rail rate comparisons of a similar nature were introduced.
>
> "The ex-river rates suggested by petitioners are consistent with the all-rail rates prescribed or approved by us for application in this same general territory both in the Ohio case and in other cases."

The suggested rate of $1.01 from Coloma and Conway to Youngstown, distance 41.0 miles, is identical with the minimum rate which the Commission prescribed in the Ohio case from the Middle district of Canton and Massillon for average distances of 42.7 and 42.9 miles and short route distances of 36.6 and 38.3 miles, respectively. (R. 979, 980; Exhibit F 7, R. 1393, etc.)

At pages 104 and 105 of their brief the appellants' misstate the basis for the proposed rate of $1.01.* They are also confused by the table of rates shown in the Ohio case, 192 I. C. C., 413, 457. That table is clarified by reference to page 415 from which it plainly appears that the rate of $1.01 applied from the Massillon and Middle districts to Massillon and Canton, except from two mines on a single railroad the rate to Canton is 76 cents. That rate of $1.01 was restored by the order in the Ohio case. See Exhibit F 7 which shows rates taken from the rate schedules.

* At page 29, etc.

** Appellants said in their brief (p. 56) in the *Ex River case:* "Much was said by the carriers' witness in the course of the further hearing with respect to the necessity of so adjusting rates as to avoid undue prejudice to inland mines and also to other coal consuming points, particularly furnace and by-product coke oven points."

** "We submit, in conclusion, that the existing ex-river rates are entirely too low; that the rates [$1.01 to Youngstown] herein proposed by petitioners are reasonable; that such proposed rates are necessary to accomplish the purposes for which ex-river rates were designed and at the same time restore proper competitive relationships between river and inland mines and protect the all-rail adjustment; that the rates proposed by petitioners should be approved and that an order requiring the (*sic*) establishment should be issued."

carriers' brief in the *Third Ex-River case*. Throughout the proceeding on rehearing, and in the petitions for rehearing, the railroads consistently maintained that the rate of 77 cents was too low when judged by every proper standard. There is no warrant in truth for appellants' effort to represent the carriers' attitude as having been otherwise. The appellants obviously [111] misrepresent the effect of the statement by the carriers' counsel.

Appellants' attempt to distinguish the *Ohio case* from the [112] *Third Ex-River case*. The undue prejudice against interstate commerce found to exist in the *Ohio case*, 192 I. C. C. 413 (sustained in *Ohio* vs. *United States*, 292 U. S. 498), was ordered removed by the Commission by increasing the intrastate rates; that is to say, the Commission there fixed minimum rates to remove undue preference and prejudice. That, in substance and in fact, the Commission again did—in the *Third Ex-River case*—*to restore reasonable relationships* and also to remove undue preference and prejudice. In the *Milwaukee case* there was a "threatened disruption of the rate structure, *without more*." In the *Third Ex-River case*, however, the disruption of the rate structure had occurred and was proved, and in addition, the lower or preferential ex-river rates were definitely shown to reflect improper relationships, and to cause undue preference and undue prejudice, in violation of Section 3 of the Act.

Appellants [113] say:

> "They [report and order in the *Third Ex-River case*] are not based upon any new evidence or any new finding as to the reasonableness of the then existing maximum ex-river rates, considered from the standpoint of the cost of the services or their ability to procure revenue."

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[111] At page 30. [112] At page 32. [113] At page 33.

The *Third Ex-River case* record contained much evidence that was not before the Commission in the *First case*. The finding of the Commission in the *Third case* was that 77c. was too low; in other words, it was not a maximum reasonable rate, but on the contrary was considerably less than a minimum reasonable rate. On neither record, however, could the Commission make a finding in respect to any rate "considered from the standpoint of the cost," because costs were not in either record.

Note 43, page 33, refers to evidence entirely prophetic in character in the *First Ex-River case* (R. 385-387) to refute the Commission's finding in the *Third case* in respect of services (R. 39, 43). The findings in the *Third case*, however, are sustained by the evidence therein presented to the Commission [99] (R. 1012-1025, particularly 1013 and 1017; 1007-1012).

Appellants' [100] contention that there was no evidence showing that the ex-river hauls and those on the compared rates were under similar conditions ignores the evidence that transportation services on ex-river coal are identical with all-rail services (R. 1012-1025; 1007-1012).

Appellants [101] contend that the order in the *Third Ex-River case* is not based on a change in conditions or new evidence as to the pertinent facts. That this is clearly erroneous is shown by the following important illustrations:

(a) In the *First Ex-River case* the services that the carriers would be required to perform on ex-river coal could not be described or considered except speculatively or hypothetically because the facilities necessary for its handling were not then in existence (R. 221). In the *Third*

[99] Compare the showing that ex-river coal is weighed, classified and assembled (R. 1013, 1017) with the all-rail operation direct from mine—without classification—to Youngstown (R. 1025).

[100] At page 34.

[101] At page 34, etc.

Ex-River case, on the other hand, there was testimony as to the actual handling. It was established that ex-river coal is intermingled at river-rail transfer points with all-rail coal and that both varieties are handled in the same trains. It was also there shown for the first time that ex-river coal requires and receives exactly the same transportation operations and services as coal handled direct by rail from mines (1013, 1014; 1010, 1011). (See 197 I. C. C., 617, 628, 629, 632, R. 39, 43.)

(b) The transfer charge was not determinable at the time of the *First Ex-River case*, 163 I. C. C. 3, 8 (R. 78); thereafter a fixed charge of 12 cents was published (197 I. C. C., 617, 626, 628, R. 38).

(c) River or barge rates were not shown in the *First Ex-River case*, although the Commission used an estimated charge of 30 cents (163 I. C. C. 3, 8, R. 77, 78). On rehearing the appellants admitted that the river charge which they pay is 25 cents, and the railroads showed an actual instance in which a river shipper's price quotation on ex-river coal allowed for a river charge as low as 8.5 cents (R. 1036, 1042; also 197 I. C. C. 617, 627, 628, R. 994, 995, 996, 997).

(d) In the *First Ex-River case* the appellants led the Commission to believe that ex-river rates would move coking coal only [19] (R. 249, 250, 251; 163 I. C. C., 3, 6, R. 75).

[19] Appellants' witness testified:

R. 251: "As far as I know the only coal that would move ex-river would be coking coal for the Youngstown Sheet & Tube Company, of over 2 million tons a year."

The same witness stated (R. 250) that his best information was that the smaller concerns would not move coal ex-river. The same witness stated (R. 249): "I stress the movement of coking coal as compared with steam coal or gas coal. As far as we know the only coal that would move is coking coal, we have no knowledge of any other coal moving that way."

The Commission—on that evidence—found that the ex-river coal will consist largely of coking coal and that domestic sizes of coal will likely continue to move all rail (R. 75).

On rehearing, however, it was shown that steam and prepared coal moved ex-river, and that the advantages in favor of the ex-river traffic were so great that they justified river shippers in screening their coal en route (R. 1010, 1020; 197 I. C. C., 617, 629, R. 39).

(e) In the *First Ex-River case* the appellants informed the Commission that ex-river coal would move in train loads (163 I. C. C., 5, 10; R. 80). On rehearing it was shown that the ex-river traffic is not so offered to the railroads. It is handled just as other coal from rail mines (R. 1008, 1013-1017).

(f) In the *First Ex-River case* the Commission did not have before it testimony in respect of the competitive necessities of inland operators as opposed to river operators. The witness for the Western Pennsylvania Coal Traffic Bureau representing both inland and river mines "had not considered" the "attitude of the inland mines" (R. 236, 237). On rehearing witnesses for inland operators, including members of the Western Pennsylvania Coal Traffic Bureau, appeared and showed the serious consequences and damages which resulted from the establishment of ex-river rates, including the ex-river rate of 77 cents (R. 1028, 1034, 1059-70).

(g) The record in the *First Ex-River case* was devoid of testimony tending to show what rates were necessary to avoid undue prejudice and preference as between ex-river transfer points on the one hand and inland mines on the other. In this particular the record in that proceeding affords a sharp contrast with that in the *Third Ex-River case* (see 197 I. C. C. 617, 621, 633, R. 29, 44; also R. 1028-1031, 1031-1034; 1059-1065, 1065-1067; 1067-1070).

(h) The *First Ex-River case* was decided on a record closed during May, 1929; that is to say, before the pre-

vailing depression in industrial activity began. The record in the *Third Ex-River case* shows, for the period up to and including the first eight months of 1933, the unfortunate effects which this depression has had upon the railroads, and their consequent urgent need for increased revenues (R. 1055-1059; Exhibits F 52 and F 52, revised, R. 1458 A., etc.). This Court will take judicial notice of this economic depression and its severe effects upon railroads. *Atchison, T. & S. F. Ry. Co.* vs. *United States*, 284 U. S. 248, 260).

IV

In making its order the Commission proceeded in accordance with standards under which the lawfulness of rates is determined and that order reflects a proper and lawful exercise of the powers and duties of the Commission and was entirely within its authority.

1. THE RATE OF 77 CENTS AND OTHER EX-RIVER RATES WERE TWICE CONDEMNED BY THE COMMISSION AS "TOO LOW."

The *Third Ex-River case* was the first proceeding in which the Commission had occasion to consider ex-river rates in the light of the realities attendant upon the carriage of coal. The record there embraced and was developed upon the records in the *First* and *Second cases* and, obviously, was more comprehensive than the previous records which, of necessity, consisted almost entirely of evidence of a most speculative and uncertain nature. An appreciation of this fact makes plain the justification for what otherwise would appear as inconsistencies between the conclusions reached by the Commission in these several cases. (As finally constituted and submitted to the Commission the *Third Ex-River case* covered thousands of pages of testimony and hundreds of exhibits). The *Third Ex-River case*, however, was in fact the second proceeding in which the Commission condemned the ex-river rate of 77

cents, and other ex-river rates based thereon, as "too low." See the specific finding of the Commission in the *Ohio case* (R. 1569, 1570). This is important, as it emphasizes the need for and propriety of the readjustment which the order of the Commission in the *Third Ex-River case* served to facilitate.

The *First Ex-River case* represented an effort to determine—by reference to unreliable factors—a fair relationship between ex-river rates, on the one hand, and all-rail rates, on the other, thereby creating one comprehensive structure that would permit both varieties of coal traffic to move, free from undue prejudice and preference. The *Second Ex-River case* was a like effort, again premised upon innumerable elements of uncertainty, and in this case the Commission merely projected to additional destinations the very basis which it employed in the *First case*. The harmful effects which these ex-river rates produced, evidenced in part by the action of the Wheeling, were responsible for substantial reductions in all-rail rates in Ohio. The unlawfulness inherent in the ex-river rates was —as previously stated—established in the *Ohio case*, but the *Third Ex-River case* afforded the first opportunity for the rendition of corrective order.

2. THE COMMISSION PROPERLY EXERCISED ITS POWERS WHEN IT CONSIDERED ALL OF THE FACTORS AND STANDARDS SHOWN OF RECORD IN PRESCRIBING THE MINIMUM RATE HERE IN QUESTION.

It is plain that the Commission prescribed minimum reasonable rates—rather than a higher maximum reasonable rate—in an effort to insure the continuance of a fair relationship between the interstate and intra-state rates prescribed in the *Ohio case* and the ex-river and all-rail rates considered in their entirety in the three Ex-River

cases (197 I. C. C., 617, 634; R. 45). For in the *Third Ex-River case* the Wheeling sought to continue its unduly low ex-river rates notwithstanding their sharp conflict with the higher intrastate and interstate all-rail rates. The necessity for and propriety of a minimum rate order was obvious. It is well established that a rate may be unreasonable because it is too low as well as because it is too high. *Interstate Commerce Commission* vs. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 511. The Commission's power under section 1 to condemn an unreasonable rate necessarily carries with it the power to prohibit any kind of an unreasonable rate. The law, in fact, imposes no standard or tests whatever by which the Commission must judge maximum reasonable rates which is not equally applicable in the determination of minimum reasonable rates. This was specifically recognized by the statutory Court in *Jefferson Island Salt Mining Company* vs. *United States*, 6 F(2) 315, 319, wherein the plaintiff unsuccessfully sought to enjoin an order of the Commission on the ground that the minimum reasonable rates fixed thereby had been determined upon without reference to and, in fact, in the absence of evidence in respect of costs.

In the instant case the Commission specifically referred to the *Jefferson Island Salt Mining Co. case* in substantiation of its asserted power to prescribe minimum reasonable rates to preserve reasonable rate relationships. While the fact situation in that case gives the decision therein particular force and significance here, there the Court merely applied principles which are plainly established by decisions of the Supreme Court. In the *Jefferson case* the Court recognized that in the exercise of its informed judgment the Commission may consider a variety of factors in fixing either maximum or minimum reasonable rates and this is clearly sustained, for example, by the decision in *Northern Pacific Ry.*

Co. vs. *North Dakota*, 236 U. S. 585, wherein this Court said at pages 598 599:

> "The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. There are many factors to be considered, differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications. Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate making power becomes impossible."

In having its conclusion in the *Third Ex Rivers case* respond to a variety of factors (Rate comparisons, services, etc., discussed elsewhere herein) in the fixation of minimum reasonable rates the Commission exercised a function which plainly inheres in its administrative power. An effort to limit the Commission to a single factor, such as [14] costs, in determining reasonable rates (minimum or otherwise) necessarily argues that the Commission must be hampered in its administrative province and makes for the utter destruction of its rate making power. Clearly all of the factors recited in the report and considered by the Commission in the *Third Ex Rivers case* caused it to determine upon 30 cents as a reasonable rate and, more, a reasonable rate that would remove existing unlawfulness. That rate itself being reasonable, it is not made less so by

[14] It must be remembered that while the Lisbon's costs were commented upon they were not in the record in any of the ex river cases; nor did those records show costs or estimates thereof from Conway and Colona to Youngstown. Moreover, costs, where shown, are only one of the many factors to be connected in determining reasonableness.

its characterization and prescription as a *minimum* reasonable rate.

3. THE DECISION OF THE COURT IN THE *Milwaukee* CASE[19] ARGUABLY SUSTAINS THE COMMISSION'S ORDER IN THE *Third Ex River* CASE.

The fact situation in the *Milwaukee case* differed from that here presented in several important particulars. There the court held that the threatened disruption of a rate adjustment, *without more*, did not empower the Commission to substitute its judgment for that of the railroad. In the instant case, however, the railroads sought to change ex river rates and with the concurrence of the Commission, the changes have since been made. In the *Milwaukee case* the railroad having the primary right to initiate rates—and the Commission were in disagreement. Here, however, both the railroads and the Commission are agreed upon the changes and the necessity, in law, for them. Here the Commission's and Carriers' efforts are in the direction of establishing a structure essentially just, in that the order herein brings the ex-river rates into a fair adjustment with the all-rail rates prescribed only shortly before in the *Ohio case*, of which the statutory Court said in *Ohio* vs. *United States*, 6 F. Sup. 386, at page 387:

> "Through the years there has been established a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from the Western Pennsylvania, Northern West Virginia, and Ohio coal mining districts, to Northeastern Ohio, with fixed differentials which have been regarded as essentially reasonable, in view of all the elements which must be considered in rate making."

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[19] *United States* vs. *Chicago, Milwaukee, etc.*, 293 U. S. —, decided March 4, 1935.

In the *Milwaukee* case, on the other hand, the Commission, in opposing the wishes of the carrier, insisted on its power to continue an adjustment of which this Court said:

> "The Commission does not hold that the existing rate relation is intrinsically sound and fair. On the contrary, it expressly concedes that the rate situation as between Illinois and Indiana groups may be in need of correction, though it expresses the belief that this should not be done in any piecemeal fashion."

Passing over the above mentioned fundamental and very significant differences between these cases, it is clear that the *Milwaukee* case, when analysed, fully sustains the order here in question. In the *Milwaukee* case there was no finding, nor was there evidence to show, that the rates caused discrimination or preference, or that rivalry between railroads threatened their capacity for efficient service. Cases showing either or both of these things were plainly set apart in the *Milwaukee* case by the Court itself, saying:

> "We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute."

The Commission, therefore, may fix reasonable rates, including minimum rates, to preserve a rate structure or prevent a change therein when:

(a) Discrimination or preference is shown; or
(b) Rivalry which menaces efficient service is apparent.

The Commission found that discriminations and preferences existed under the former ex-river rates and proper basic findings were made. To illustrate, the Commission found:

1. Inland coal producers served by these intervening railroads testified about their great disadvantages

in competition with producers who use ex-river rates of the same railroads (R. 29).

2. Some inland mines have lost their business entirely, and others testified that if the then existing ex-river rates were continued their ex river competitors would completely exclude them from markets having those rates (R. 29).

3. The ex river rates suggested (including the rate of $1.01 to Youngstown) are consistent with rates prescribed or approved by the Commission in the *Ohio case* and in other cases (R. 32).

4. Compared rates of record are as high as or higher, distance considered, than the suggested rate ($1.01) (R. 32).

5. The volume of production at inland and river mines (R. 29).

6. The tonnage of coal consumed at points having ex-river rates (R. 41) and tonnages moved ex river (R. 42).

7. The services rendered on ex river coal at and from transfer points are identical with those on coal from rail mines (R. 43).

These findings, all clearly supported by the evidence of record, amply support the ultimate finding of undue prejudice and preference and thereby place this case in the class of those within the first exception of the *Milwaukee case*.

This case also falls within the second exception to the rule of the *Milwaukee case*, for the ex river rates were shown to have resulted in keen rivalry between railroads which threatened their efficient service. To illustrate: In the *First Ex River case* the Commission recognized that the rate to Youngstown must afford the basis for ex-river rates to Cleveland, Canton and other points (163 I. C. C., 3, 13. R. 83). The *Second Ex-River case* arose when the Wheeling's effort to obtain ex river traffic *impelled* it to publish ex-

river rates to Cleveland, etc., materially less than its all rail rates (185 I. C. C., 211, 213. R. 88; 197 I. C. C., 617, 624. R. 33) and the rates which the Commission approved to those points were premised upon and related to the rate to Youngstown (185 I. C. C. 211, 221). This second case, therefore, arose entirely from the competitive desire of a railroad for ex river traffic. Thereafter the rivalry of the Wheeling to retain its all rail coal, in competition with ex river coal from West Virginia (R. 1471 1478), was responsible for substantial changes in all rail rates, which, with certain inter changes, threatened to disrupt the entire central territory adjustment and gave rise to the *Ohio case*. The decision of the Commission in that case sufficiently proclaimed the menace to efficient railroad service which characterized the Ohio reductions influenced, as previously stated, in large measure by the ex river rates. This threat is also disclosed by the decision in the *Third Ex-River case* wherein the Commission found that the ex river rates have tended to disrupt that very same rate structure. See also the Commission's findings in reference to coal tonnages consummed at important points in central territory; the vital importance of that traffic, and the revenues therefrom, to the railroads, and also the financial situation of the railroads (197 I. C. C., 617, 630, 631, 632). The fact situation therefore plainly characterizes this case as one, within the meaning of the court's language in the *Milwaukee case*, in which the Commission was fully justified in exercising its minimum rate power.

We emphasize in concluding our discussion of the *Milwaukee case* that the order in the *Third Ex River case* was not designed to, nor did it, prevent change, but on the contrary merely facilitated the change which the intervening railroads themselves wished to make. Moreover, while for the purpose of argument we have demonstrated

that the order in the *Third Ex River case* can be adequately defended as one that is essential to prevent a disruption of a rate structure the order in fact merely prescribes a reasonable rate basis necessary to restore proper and lawful relationships and remove undue prejudice and preference. Certainly nothing in the *Milwaukee case* limits or denies the power of the Commission to prescribe reasonable rates (minimum or otherwise) and require that existing unlawfulness in rates be removed. *A fortiori* the *Milwaukee case* supports the report and order in the instant case which correct the unlawfulness therein found to exist.

I. THE COMMISSION WAS EMPOWERED TO DECIDE THE *Third Ex-River case* ON THE RECORD THEN PRESENTED UNEMBARRASSED BY ITS FINDINGS IN OTHER CASES.

This court has held that on reconsideration of the identical record the Commission is not in any way bound by its former conclusions, and may, in fact, make other findings and conclusions which conflict with those previously announced. *Manufacturers Ry. Co. vs. United States*, 246 U. S. 457, 482. No continuing presumption of correctness existed in favor of the former rate of 77 cents. It had no sanctity that would hamper or embarrass the Commission on reconsidering. It is not necessary, however, to rest the decision in the *Third Ex River case* alone on this sufficient ground, for, in fact, much additional evidence was received and considered by the Commission in that proceeding. This evidence and the basic findings thereon very materially differed from the evidence and findings in the *First* and *Second cases* and abundantly explain and justify the different conclusions reached in the *Third Ex-River case*. We pointed out these differences elsewhere herein and will not review them again. *Supra*, 28-31.

By reference to findings in another case before the Commission, based on evidence highly speculative in character

but not in this record, the appellants set out the Lisbon's estimated transportation cost (*as of 1928*) of 42 cents and then by a process of deduction and calculation arbitrarily reached the conclusion that the same or lower costs would be incurred by the intervening railroads in the carriage of coal from Conway and Colona to Youngstown. (Brief, pp. 55 57, 73, 74). Appellants then proceed to argue, in effect, that because of these hypothetical costs on a railroad which was never built, 90 cents cannot be a minimum reasonable rate. These hypothetical costs are not in this record, and obviously could not have been considered by the Commission. *Interstate Commerce Commission* vs. *Louisville & N. R. R. Co.*, *supra*, 91, 93; *United States* vs. *Abilene & Sou. Ry. Co.*, 265 U. S. 274, 288. Moreover, the appellants entire argument on this point erroneously presupposes that costs, when shown, are the sole or controlling standard by which to judge reasonableness when, in fact, it is merely one of many standards. *Adriatic Mining Co.* vs. *C. & N. W. Ry. Co.*, *supra*, *Northern Pacific Ry. Co.* vs. *North Dakota*, *supra*. See our discussion, *supra* 22, 23.

3. THE EXERCISE OF THE COMMISSION'S MINIMUM RATE POWER WAS NOT ACTUATED BY A DESIRE TO FORCE RIVER-RAIL TRAFFIC TO ALL-RAIL ROUTES.

Appellants assert that the Commission in exercising its minimum rate power was actuated by a desire to force river-rail traffic to all-rail routes. This contention cannot be maintained and does grave injustice to the Commission. The prescribed minimum rate of 90 cents is, in fact, 11 cents less than $1.01 suggested by the railroads. As to this suggested rate the Commission specifically found:

(a) That it was consistent with the all-rail rates prescribed or approved by the Commission for ap-

plication in the same general territory. (197 I. C. C., 617, 623 R. 32)

(b) That the compared rates are as high as or higher, distance considered, than the suggested rate of $1.01. (197 I. C. C., 617, 623 R. 32)

(c) That the service rendered on ex-river coal at and from the river transfer points is identical with that on coal from local mines. (197 I. C. C., 617, 632 R. 39, 43)

The Commission further recognized that there was nothing inherent in ex water (import) traffic which entitles it to lower rates than on domestic or local traffic. Moreover, the decision in the *Third Ex-River case* followed that in *Fluorspar, Ex-River, to Ohio and Pennsylvania*, 186 I. C. C., 670 (1932), in which the Commission prescribed ex-river rates on fluorspar, including a rate from Colona to Youngstown, which reflect the identical basis or level as all-rail rates. These considerations illustrate that the ex-river rate of 90 cents is less than it might be and for that reason is properly characterized as a minimum reasonable rate. This rate (as against 77 cents) narrowed, but by no means destroyed the advantage held by the ex-river shipper as compared with the all-rail shipper and, at the same time, removed an unwarranted and unlawful discrimination against all-rail shippers. The appellants cannot be heard to contend otherwise for the admissions of one of their own witnesses proves that on the ex-river rate of 90 cents ex-river shippers still will have advantages of at least 7 cents or 15 cents (depending on the origin group) as compared with their inland competitors (R. 1034, 1036, 1042). In this connection the appellants said in their brief (of July 31, 1933, p. 51) in the *Third Ex-River case*:

> "The proposed rates [$1.01 to Youngstown] should also be rejected by the Commission because the river-

> and rail combination charges which would result from their application would be substantially the same as the all rail hauls from the same mines to the same destinations, and would immediately divert all of the traffic from river and rail to all rail routes."

On the record in the *Third Ex Rate* case the appellants further insisted very frankly that in the level of the ex river rate the carriers should be required to equalize, in part, Youngstown's geographic disadvantages (R. 1073), and they rested upon the *Lisbon* case and the *First Ex Rate* case, as apparently they still do, as affording a reasonable expectation that the railroads and Commission would, in effect, be estopped from increasing the rate of 77 cents. The Commission very properly rejected these contentions. *Mahoning, T. & S. P. Ry. Co. vs. Interstate Commerce Commission*, 180 Fed. 591, 594, 598, affirmed *Per Curiam*, 231 U. S. 730. The railroads which participate in the ex river rate to Youngstown Pennsylvania, Pittsburgh & Lake Erie and Baltimore & Ohio also serve consumers of coal at other important cities and also shippers of coal at inland mines. The duty upon them to maintain reasonably and non discriminatory rates applies alike to ex river and all rail rates and the Commission's power to abate unlawfulness of either type is neither more nor less in respect of ex river than in the case of all rail rates.

V

The rate comparisons and other evidence of record afford ample support for the finding that the rate of 77 cents tended to cause a disruption of the rate structure and that the rate of 77 cents is unreasonably low.

In its report in the *Third Ex Rate case* the Commission considered evidence as follows:

(n) Earnings from ex-river rates, including the 77-cent rate (R. 29, 30).

(b) Consistency between the proposed rates and rates prescribed in the *Ohio case* (R. 29, 30).

(c) Comparisons with the Holmes and Hollowell scale (R. 32).

(d) Comparisons between the suggested rates and other rates for distances up to 50 miles on the Pennsylvania R. R., Pittsburgh & Lake Erie R. R., and P. C. & Y. R. R., and other all rail rate comparisons of a similar nature (R. 32).

(e) Rates prescribed in the *Ohio case* and in other cases (R. 32).

(f) Rate from the Lowellonia group to Youngstown (R. 32).

(g) Loading of coal and cars hauled per train; and certain other railroad operating items (R. 33).

(h) Ex River rates on certain commodities are the same as all rail rates (R. 34).

(i) Cargo coal rates and the ex lake rate from Chicago to Rockford (R. 34, 35).

(j) Transfer charges; also barge charges introduced by appellants and others (R. 36-38).

(k) Facilities for handling ex river coal (R. 38, 39).

(l) The fact that at Martins Ferry ex river and local coal are handled through and from the same facility (R. 39).

(m) Location of mines with reference to certain ex-river loading facilities (R. 40).

(n) Switching charges absorbed from ex-river rates (R. 40, 41).

(o) Tonnages received at Youngstown, etc., and production and movement of coal (R. 41).

(p) Extent of competition between all-rail and ex-river coal and tonnage carried on ex-river rates (R. 41, 42).

(q) Financial condition and results of railroad operation (R. 42, 43).

(r) Services rendered on ex-river coal (R. 39, 43).

Based on this and other evidence the Commission made these very significant findings:

1. "All of these rates are as high as or higher, distance considered, than the suggested rate of $1.01 from Colona and Conway to Youngstown" (R. 32).
2. "The ex-river rates suggested by petitioners are consistent with the all-rail rates prescribed or approved by us for application in the same general territory both in the *Ohio case* and in other cases" (R. 32).
3. "The services of switching, furnishing empty cars, and classifying the shipments at these [Conway and Colona] transfer points are not materially different from those performed at mines" (R. 39).
4. "From an operating standpoint these cars [from the Wheeling's transfer points] of ex river coal are handled in substantially the same manner as the coal from mines in Ohio No. 8 district in the same general territory" (R. 39).
5. "The present record shows clearly that the service rendered on ex-river coal at and from the river transfer points is identical with that on coal from local mines served by tracks similar to those at the river transfer points" (R. 43).
6. That the railroads were advocating ex-river rates "on substantially the all-rail basis" (R. 44).
7. "The record also fully establishes that the maintenance of the present ex-river rates has tended to disrupt the rate adjustment in this territory and jeopardized the revenues of the rail carriers" (R. 45).

The evidence abundantly sustained the facts found by the Commission and, in turn, the facts found fully support the

conclusion that 90 cents is a minimum reasonable rate for the transportation service from Conway and Colona to Youngstown. This is obvious upon considering the report and order of the Commission in their entirety, as they must be considered. *American Express Co.* vs. *Caldwell*, 244 U. S. 617, 626, 627. The findings sufficiently and clearly conform to the requirement of definiteness. *Georgia Public Service Commission* vs. *United States*, 283 U. S. 765, 773; *Florida* vs. *United States*, 282 U. S. 194, 208. Not only did the Commission have numerous rate comparisons before it, but those comparisons were given particular significance by testimony showing that the services on the compared rates—all-rail rates—are substantially the same as those on ex-river rates. Obviously, from the great mass of evidence before it the Commission, in the exercise of its informed judgment, was qualified and empowered to find 90 cents to-be a minimum reasonable rate, especially as the evidence before the Commission warranted a finding that rates of $1.01 and higher apply for like transportation services in the same general territory and that $1.01 is consistent with reasonable rates which the Commission itself had prescribed for application in the same general territory. It is equally apparent that, in the exercise of that same enlightened judgment, the Commission could properly find that 77 cents to Youngstown tended to disrupt the rate structure and endangered the carriers' revenues, particularly as it was demonstrated that that same rate, projected to other points, actually did—by the action of the Wheeling—disrupt the rate structure, with serious consequences to shippers and carriers alike. *Ohio case, supra.*

The Commission, in the *Third Ex-River case* did not prescribe the $1.01 rate proposed by the carriers, but did fix a lower rate of 90 cents, as a substitute for that of 77 cents. With these points in mind, its findings and conclu-

sions in the *Third Ex-River case*, read in the light of the Commission's comprehensive discussion of the evidence, have particular significance. Thus in *Mississippi Valley Barge Line Co.* vs. *United States, supra*, this Court said at page 287:

> . . . "In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader, upon the face of the report. The rates were not approved as the respondents had submitted them. . . . There was a sedulous endeavor to guard against a rate war that would end in mere oppression."

The findings of the Commission are *prima facie* true and correct. Thus in *Illinois Central Railroad Co. vs. United States*, 206 U. S. 441, the court said at page 454:

> . . . "And the findings of the Commission are made by law *prima facie* true. This Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. *Louisville & Nashville Railroad Co.* v. *Behlman*, 175 U. S. 648; *East Tenn. C. Railroad Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 27."

In *Interstate Commerce Commission* vs. *Union Pacific R. R. Co.*, 222 U. S. 541; the court held at page 550:

> "With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate.

> The law makes the Commission's finding on such facts conclusive."

Every possible argument against the Commission's findings and order in the instant case is sufficiently answered by the language of this Court in *Georgia Public Service Com.* vs. *United States, supra,* at page 775, as follows:

> ". . . The argument is, in effect, an appeal to this Court to review the exercise of administrative discretion. It is not our province to enquire into the soundness of the Commission's reasoning, the wisdom of its decisions, or the consistency of its conclusion with those reached in similar cases. *Western Paper Makers' Chemical Co.* vs. *United States,* 271 U. S. 268, 271."

See also *Skinner & Eddy Corp.* vs. *United States,* 249 U. S. 557, 562; *New England Divisions Case,* 261 U. S. 184, 204; *Chicago R. I. & P. Ry. Co.* vs. *United States,* 274 U. S. 29, 33; *Western Paper Makers' Chemical Co.* vs. *United States, supra,* 270; *Virginian Ry.* vs. *United States; supra,* 663; *Ohio case, supra,* 506, 510, 511.

It was for the Commission to appraise the rate comparisons in the light of the evidence showing that similar transportation services are performed in the carriage of ex-river and all-rail coal. Certainly the asserted grounds for questioning the Commission's conclusions are convincingly answered when it is remembered that the rate of 90 cents is less than rates which the Commission itself prescribed only shortly before (in the *Ohio case*) for like distances in the same general territory. It is no argument against the comparisons of record to say that "costs" or "similar costs" were not shown. Manifestly that goes entirely to the weight of the comparisons. Moreover, as previously stated, the Lisbon's so-called costs are not in this record,

and, in addition, those estimates of costs were for assumed services on a line of railroad which never existed.

Appellants' untenable argument that the Commission errs in considering comparisons and in prescribing rates by reference to distance alone was effectively answered by this court in *Georgia Public Service Commission* vs. *United States*, *supra*, at page 775 as follows:

> . . . "The argument is, in effect, an appeal to this Court to review the exercise of administrative discretion."

Likewise appellants' continued reference to certain railroad operating features between Conway or Colona and Youngstown is an appeal to the Court to weigh the evidence. In any event, it should be remembered, that the operating conditions between the points mentioned are obviously identical on ex river coal and on all rail coal which, enroute from mines, passes over the same lines of railroad. The comparisons introduced in the *Third Ex-River case* were not less forceful merely because they consisted, in part, of rates prescribed in the *First Ex River case*. On the contrary, under the Commission's standards, the continuance of the compared rates during the period that followed the first hearing enhanced their probative value. *Chamber of Commerce* vs. *N. Y. C. & H. R. R. R. Co.*, 24 I. C. C., 55. The argument that the Commission should have prescribed rates by reference to a particular Chesapeake & Ohio rate or Baltimore & Ohio rate is obviously unsound. Manifestly, the Commission cannot make a valid order by excluding every consideration save a small fraction of the evidence in a record of thousands of pages. Moreover, the request to this Court to weigh the ex-river rates and these comparisons is merely an additional appeal to the Court to substitute its judgment for the administrative discretion of the Commission. See *Ohio* vs. *United States*, *supra*, 506, 510, 511.

The decision of the Commission in *Pittsburgh Coal Producers' Assn.* vs. *Ashland C. & I. Ry. Co.* (Feb. 20, 1934), (18 1604 1621), does not in any way conflict with the findings and conclusions of the Commission in the *Third Ex-River case*. In the *Pittsburgh case* the Commission held that maximum reasonable rates which it had previously prescribed, *and still regarded as such*, could not be increased. This situation strikingly contrasts with that in the *Third Ex River case* in which the rate previously *suggested* as maximum reasonable was found, in fact, to be considerably less than a minimum reasonable rate. For other reasons, readily apparent upon reading the report, the decision in the *Pittsburgh case* is entirely lacking in significance or bearing upon the issues here. That proceeding involved rates on cargo coal, and the Commission fully and carefully considered those rates in prescribing minimum reasonable ex river rates in the *Third Ex River case*. (R. 34, 35).

VI

The Commission properly exercised its powers and duties under the Interstate Commerce Act when it prescribed rate relationships to eliminate undue prejudice and undue preference found to exist, which rate relationships were to be used in connection with minimum reasonable rates prescribed by the Commission.

1. The Section 3 order of the Commission was alternative within the requirements and contemplation of the law.

In this Court for the first time the appellants assail the section 3 order on the alleged ground that it is not alternative in form. No such question was raised in the Court below, nor do we find that it is set out in the assignments of error. That point should not be considered by this Court.

The order of the Commission was two-fold in function

and purpose. It required, first, the discontinuance of an unreasonably low rate and the establishment of a minimum reasonable rate of 90 cents. That in these particulars the order was fully within the powers of the Commission under sections 1 and 15 (1) has been demonstrated elsewhere herein. In its second and separate aspect the order, under section 3, only prescribed rate relationships necessary to remove undue prejudice and preference. In establishing rate relationships, however, in compliance with orders under section 3, the railroads must at all times keep the resulting rates within the range of reasonableness. *United States vs. Illinois Central R. R. Co., supra*, 524. This is fundamental, and rests upon the principle that a railroad cannot use one section of the Act as a cloak for the violation of another. As the rate of 77 cents was less than a minimum reasonable rate, and was specifically found to be so, plainly it could not be used as a base for the required rate relationships under section 3. Thus the finding of unreasonableness, considered apart from the section 3 feature of the order, assisted the railroads in fulfilling their appointed duty, in that it conveniently set out for their guidance the limit of lawfulness under section 1 standards. A section 3 order necessarily contemplates the establishment of a reasonable rate and therefore the situation in the instant case was, in substance, not different than if 90 cents was already effective, either under a previous order or by voluntary action of the railroads. Plainly, therefore, the Commission's order, considered alone from a section 3 viewpoint, was alternative in form, at least it was so to the extent to which a carrier, mindful of its obligations under section 1, could exercise a choice in removing undue prejudice and preference. The order was for this reason a proper exercise of the Commission's powers, for the alterna-

tive action which it allowed the railroads was, in fact, co-extensive with the limits of the law.

The situation here presented is in substance identical with that which was before the court in *St. Louis Southwestern Ry. Co.* vs. *United States*, 245 U. S. 136, 144, 145. (That case, incidentally, was decided before the passage of the Act of 1920 which gave the Commission specific authority to fix minimum rates 15(1).) In that case the Commission found that a rate of 22 cents to Paducah was unreasonably high and that, under section 3, the relationship between Paducah and Cairo was improper and that the then existing undue preference and prejudice should be removed by publishing to Paducah rates no higher than those to Cairo. There the improper relationship could not be removed by increasing the Cairo rate to the Paducah basis which was found to be unreasonably high. That order, of course, was valid under section 3, yet it did not, and manifestly could not, permit the railroads to remove undue prejudice and preference by publishing an unreasonable high rate. It necessarily follows that the section 3 order in the instant case is equally sound and valid. Indeed, the order in the *St. Louis Southwestern case* is in every pertinent particular like that here under review. It is wholly immaterial that by weighting the separate functions of the respective orders it is found that one is primarily a section 1 (and 15) order and the other primarily a section 3 (and 15) order. The orders in each of these cases were plainly alternative in form within the contemplation of law.

The report and order of the Commission in this proceeding do not in any way conflict with the decision of this Court in *Texas & Pacific Railway* vs. *United States*, 289 U. S. 627. There the Court recognized at page 633 that the rates under review were not before the Commission under section 1 of the Act. In other words, that case involved a

fact situation which is essentially different from that here under consideration, for there the Commission could not have made a finding or order in respect of reasonable rates, minimum or otherwise. This very significant aspect of the case was noted by this Court at page 651. In fact the want of a section 1 issue in that proceeding before the Commission was explained by the Court as a particular in which that case was distinguishable from *St. Louis Southwestern Railway Co. vs. United States, supra.* In the instant case, however, the combined proceeding before the Commission, being a rehearing of two Investigation and Suspension cases was as broad and extensive in scope as the power conferred on the Commission by the entire Interstate Commerce Act. The Commission therefore, was under the manifest duty to correct every form of unlawfulness which was disclosed by the record, and that is what the Commission did in issuing an order under section 3, and section 1 as well.

It should be remembered also that in *Texas & Pacific Railway Co. vs. United States, supra*, the assailed order deprived the railroad company of its primary control over its own rates without showing that those rates were less than reasonable and wholly on evidence which purported to disclose improper relationships with other rates which that carrier could not control. In the present case, however, the order of the Commission denies the appellants no right whatever, for they are entitled to neither more nor less than a reasonable rate which is free from undue preference and undue prejudice. *Sprunt & Sons vs. United States, supra.* This the appellants have under the order of the Commission.

2. THE COMMISSION'S ORDER REQUIRES THE REMOVAL OF UNDUE PREFERENCE AND PREJUDICE BETWEEN PARTICULAR DESCRIPTIONS OF THE SAME TRAFFIC.

Section 3(1) reads:

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any description of traffic in any respect whatsoever . . ."

It is thus seen that under this section "it is unlawful . . . to make or give any undue or unreasonable preference or advantage to any . . . description of traffic." The evidence before the Commission clearly showed that one variety of coal (ex river coal) was being accorded substantially lower rates than the same commodity more particularly described as coal from inland mines. That evidence, and additional testimony showing that the transportation services rendered in the carriage of both descriptions of traffic (that is, ex river coal and coal from inland mines) constitutes, without more, complete justification for the order herein entered under section 3.

3. THE EVIDENCE OF RECORD AND THE FINDINGS THEREON SUSTAIN THE COMMISSION'S CONCLUSION THAT UNDUE PREFERENCE AND UNDUE PREJUDICE EXISTED.

The finding of undue prejudice and undue preference is a finding of fact included within the administrative functions of the Commission. In this connection this court held in *Central Railroad Company* vs. *United States*, 257 U. S. 247, at page 256:

> "As to administrative orders operating *in futuro* the Commission's findings of fact are conclusive, subject to qualifications here not pertinent; and a

finding that the discrimination is unjust is ordinarily a finding of fact."

The powers of the Commission and the credit which this Court will give to the Commission's findings and orders were set out in greater detail in *Manufacturers R. R. Co.* vs. *United States, supra,* as follows:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power." (page 481)

> "The conclusions [on issue of discrimination] were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361." (page 482)

It is no argument against the Commission's order to say that it is based on testimony of a limited number of witnesses. The law contemplates uniformity of treatment and plainly the Commission is under the duty of removing un-

due preference and prejudice entirely independently of the standing or number of the persons affected thereby. We have hereinbefore mentioned the fact that the ex-river rates found unlawful in the *Third Ex-River case* were all on a common basis. That is to say, the rates of the Wheeling, and of other railroads to destinations beyond Youngstown, consisted wholly of rates that had been projected on the rate of 77 cents from Colona and Conway to Youngstown. The undue prejudice and preference under all of these ex-river rates is clearly shown by the evidence which is summarized as follows:

(a) The Consolidation Coal Company, which formerly shipped in large volume to northeastern Ohio, finds the existing differences in favor of ex-river coal too great to overcome. This company has lost to river competitors large contracts on which it bid. In some instances the advantages in favor of ex-river shippers were known to be so great that this company despaired of obtaining contracts and therefore did not submit bids. (R. 1029-1031)

(b) The Butler Consolidated Coal Company sold to numerous industries in Ohio prior to June, 1932, but since then has not obtained a contract in that state. Sales offices at Cleveland and Youngstown maintained since 1928 were closed in April, 1933 because of reduced rates from Ohio districts (influenced largely by ex-river rates) and the low level of the ex-river rates themselves. (R. 1031-1034)

(c) The present ex-river rates have greatly increased the difficulties of Westmoreland Coal Company in selling in Ohio markets, and if continued will definitely exclude that company's production from that state. The sales of this company in Ohio of 250,000 tons in 1930 dropped to 24,600 tons in 1932. (R. 1059-1065)

(d) Competitors having access to ex-river rates defi-

nitely exclude the Jamison Coal & Coke Company from markets having ex-river rates. (R. 1065-1067)

(c) The Carnegie Coal Company, which formerly shipped to Cleveland on eleven industrial accounts, moved its last car to that territory four months after ex-river rates became effective. This company also had a substantial business in Youngstown, but lost its last contract there during April, 1933. (R. 1067-1070)

The evidence thus summarized directly charged the losses sustained by these inland mine operators to the ex-river rates; the gain having been that of their competitors having ex-river rates. Plainly, therefore, there was ample evidence to support the Commission's findings of facts, and these in turn abundantly sustain the ultimate finding of undue prejudice and preference. Certainly argument to the contrary is against reason, and is subject to the additional and conclusive answer that it is an appeal to the Court to weight the facts and substitute its judgment for that of the Commission. Nor, indeed, can it be said in truth that, in removing undue prejudice and preference, the Commission sought to equalize opportunities and fortunes of inland and ex-river shippers. The ex-river rates are charges for railroad transportation services of the identical railroads that carry coal from the complaining inland mines. Allowing for differences in distances the services are the same, and the clear necessity for equality of treatment, under section 3(4), made unlawful the sharp disparity between the former ex-river rate of 77 cents and the considerably higher level of all-rail rates and, accordingly, justified and supported the Commission's order.

The railroads have not asserted at any stage of this proceeding that the appellants should be deprived of any portion of the savings that inures to them by the use of

water transportation facilities. Nor has the Commission. Traffic so carried and later offered to a railroad is not—for the rail service, beyond the pale of sections 1 and 3. It is then entitled to that rate which, under sections 1 and 3, is lawful; and, to neither more nor less. This was recognized by the Commission in terms that cannot be mistaken.

The appellants err in contending (Brief, p. 132) that the 77 cents rate was compelled by competition;—that of the Lisbon. How could a railroad that never came into existence qualify as a competitor of an existing railroad? To state the question is to disclose its answer. Moreover, the judgment of the railroads would constitute the best index of the rates which they believed were compelled by competition. It should be remembered—on that point—that they proposed $1.02 and $1.01 to Youngstown in the *First* and *Third Ex-River cases*, respectively. Appellants effort to have the Court weigh certain rate comparisons (Brief pp. 134, 135) is an obvious attempt to narrow this case to a small particle of the evidence of record and is, besides, an improper appeal to the judgment of the Court. It is within the province of the Commission to weigh all comparisons, including rates for both similar and dissimilar distances. *Ohio* vs. *United States*, *supra*.

Appellants' argument (Brief, pp. 136, 137), that undue prejudice and preference is not a question of fact for the Commission is in direct conflict with their contention (on Brief, p. 50, etc.), before the Commission, that the Commission should find that the railroad's suggested ex-river rate of $1.01 to Youngstown would be unduly prejudicial. This question, however, was not raised in the Court below, and therefore can not be considered by this Court. In any event the argument now urged by appellants is contrary to decisions of this Court: *Supra*, pp. 53, 54.

Appellants' contention (Brief, p. 140), that consumers of

captive coal are not potential customers of coal from inland mines is not warranted by the record, although the appellants did give that impression in their testimony in the *First Ky. River* case (R. 249-251). In the *Third Ky. River case*, however, a witness for the appellants admitted that *under normal conditions*, his company, having captive mines, actually purchases a considerable tonnage of coal (R. 1035). The record also shows that another steel company having a captive mine in Kentucky purchases coal in the Pennsylvania and West Virginia markets (R. 1128).

In *Barrett vs. Atchison, T. & S. F. Ry.*, 172 I. C. C., 319, 333, 334, cited in appellants' brief, pp. 138, 139, the Commission was considering the character of evidence necessary to sustain a finding of undue preference and prejudice in respect of rates applicable to *different commodities*. The Commission there was not concerned with *different rate levels* for railroad transportation of the identical commodity, as is the case here. The findings of undue prejudice and preference in the instant case are sustained by principles repeatedly applied by the Commission in other cases which as here involved different rates on the same commodity. In *Acme Mills vs. A. G. S. R. R. Co.*, 136 I. C. C., 114, the Commission stated at page 119:

> . . . "When the carriers deprive a community and its people, without justification, of treatment with respect to rates equal to that accorded to their competitors, they are, we believe, inflicting injury and are guilty of subjecting that community and its people to undue prejudice and disadvantage in violation of section 3."

In *Potomac Electric Power Co. vs. C. & O. Ry. Co.*, 142 I. C. C., 236, at page 250 the Commission held:

> "Carriers have an option in establishing rates

lower than reasonable maximum rates and lower than we may prescribe, but they may not exercise that option to the prejudice of any shipper or any locality. It is the fundamental purpose of the act to compel carriers as public agents to give equal terms to all, to avoid every form of discrimination, favoritism, and inequality and to place all shippers on equal terms. *New Haven R. R.* vs. *Interstate Com. Com.*, 200 U. S. 361."

To the same effect are: *Inland Waterways Corp.* vs. *A. G. S. Ry. Co.*, 151 I. C. C., 126, at page 143, and *Green Bay Association of Commerce* vs. *A., T. & S. F. Ry. Co.*, 164 I. C. C., 533, at page 539.

CONCLUSION

The Commission's report and order met every requirement of the law, and for the reasons herein stated the appeal and bill of complaint should be dismissed.

Respectively submitted,

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April, 1935.
Baltimore, Md.

APPENDIX

STATUTES.

The Interstate Commerce Act, as amended, provides in part:

"§ 1, par. (5) *Just and reasonable charges required; classification of messages, and rates; exchange of service.* All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided*, That messages by wire or wireless subject to the provisions of this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further*, That nothing in this chapter shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services" (c. 104, 24 Stat. 379, as amended; c. 3591, 34 Stat. 584; c. 309, 36 Stat. 544; c. 91, 41 Stat. 474; U. S. C. Title 49 Sec. 1 (5)).

"§ 3, *par.* (1) *Undue preferences or prejudices prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of

traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" (c. 104, 24 Stat. 380, as amended; c. 91, 41 Stat. 479, 49 U. S. C. A. § 3 (1)).

"§ 15, *par.* (1) *Commission empowered to determine and prescribe rates, classifications, etc.* Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property or for the transmission of messages as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist,

and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed" (c. 104, 24 Stat. 384 as amended; c. 3591, 34 Stat. 589; c. 309, 36 Stat. 551; c. 91, 41 Stat. 484; 49 U. S. C. A. § 15 (1)).